

ELECTRONIC CONTRACTING: RECENT DEVELOPMENTS



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January 20, 2001

THE BACKGROUND



- ⌘ Statute of Frauds
- ⌘ What is a Signature?
- ⌘ Offer and Acceptance

STATUTE OF FRAUDS



⌘ UCC 2-201

⌘ UCC 1-206

⌘ Non-UCC Statutes (Cal. Civil Code §1624)

UCC 2-201



⌘ Sale of goods of \$500 or more

⌘ Exceptions:

- ☑ Goods for which payment has been made and accepted

- ☑ As between merchants, if a confirmation is sent and not objected to w/in 10 days

- ☑ If party admits in court that a contract for sale was made, up to the quantity of goods admitted

UCC 1-206



- ⌘ Sale of personal property of \$5000 or more
- ⌘ Doesn't apply to sales of goods, securities or security agreements

CIVIL CODE STATUTE OF FRAUDS



- ⌘ Agreement that is not to be performed within a year
 - ☑ Courts have narrowed this to agreements that cannot possibly be completed within a year
- ⌘ Real property
- ⌘ Guarantee debts of another
- ⌘ Promise to extend credit
- ⌘ Exception for swaps, repos and similar transactions

WHAT IS A SIGNATURE?



⌘ UCC 1-201 (39)

⌘ "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing

OFFER AND ACCEPTANCE



⌘ UCC 2-206: Offer invites acceptance in any manner and in any medium reasonable in the circumstances

⌘ UCC 2-207: “Battle of the forms”:

☑ Acceptance with additional or different terms is still an acceptance, unless expressly conditional on assent to those terms

☑ Additional terms are proposals for addition to the contract

OFFER AND ACCEPTANCE



- ⌘ UCC 2-204, 2-207: Conduct by both parties which recognizes the existence of a contract establishes a contract
- ⌘ Mailbox rule
- ⌘ “Shrinkwrap” and “click-wrap” increasingly accepted by courts. *Pro CD* (7th Circuit); *Mortensen v. Timberline* (WA); *Caspi v. Microsoft* (NJ); *Register.com v. Verio* (SDNY). But see *Klocek* (KS); *TicketMaster* (CA)

WHAT DOES UETA DO



⌘ Overcome the Statute of Frauds:

- ☑ A record or signature may not be denied legal effect or enforceability solely because it is in electronic form
- ☑ If a law requires a record to be in writing, an electronic record is ok
- ☑ If a law requires a signature, an electronic signature satisfies the law
- ☑ Evidence of a record or signature may not be excluded solely because it is in electronic form

WHAT'S AN ELECTRONIC SIGNATURE



- ⌘ An electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign (§2(8))
- ⌘ Distinction among electronic signature/digital signature/digitized signature
- ⌘ Distinction between writing and record
- ⌘ Should there be a presumption of validity for some types of electronic signature?

UETA: OFFER AND ACCEPTANCE?



⌘ E-Mailbox rule: An electronic record is received when it:

- ☑ enters an information processing system that the recipient has designated or uses
- ☑ for the purpose of receiving electronic information of the type sent
- ☑ from which the recipient is able to retrieve the record
- ☑ is in a form capable of being processed by that system

E-MAILBOX RULE

CONTINUED



- ⌘ An electronic record is received even if no individual is aware of its receipt
- ⌘ Receipt of an electronic acknowledgement from the recipient's information processing system establishes that a record was received but does not establish its content
- ⌘ Knowledge that a record was not actually sent or received throws the transaction into other applicable law

E-MAILBOX RULE CONTINUED



- ⌘ An electronic record is deemed to be sent/received from the sender/recipient's place of business
- ⌘ If more than one place of business, look to the place having the closest relationship to the underlying transaction

OFFER AND ACCEPTANCE: ELECTRONIC AGENTS



- ⌘ Electronic agent: a computer program or automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual
- ⌘ EDI as precedent
- ⌘ Whose agent is it?

OFFER AND ACCEPTANCE: ELECTRONIC AGENTS



- ⌘ Contract may be formed by the interaction of electronic agents, even if no individual was aware of or reviewed the terms and agreements
- ⌘ Contract may be formed by action that individual is free to refuse which the individual has reason to know will cause an electronic agent to complete the transaction or performance

TRANSFERABLE RECORDS



- ⌘ UCC Article 3 assumes that an instrument is a physical item
- ⌘ UCC Article 7 assumes that a document of title is a physical item
- ⌘ UETA scope excludes Articles 3 and 7 (California does not exclude Article 7)

TRANSFERABLE RECORDS



- ⌘ Solution: Create a new definition
- ⌘ A Transferable Record is an electronic record that would be a note under Article 3 or a document under Article 7 if it were in writing
- ⌘ Does not include orders under Article 3 (i.e., checks)

TRANSFERABLE RECORDS



- ⌘ The issuer of the record must expressly agree that the record is transferable
- ⌘ A person having “control” of a transferable record is the holder of the record, and is a holder in due course if the applicable requirements are satisfied
- ⌘ Delivery, possession and indorsement are not required

CONTROL



- ⌘ Precedent: Electronic chattel paper under revised UCC Article 9
- ⌘ A person has control if a system reliably establishes that person as the person to whom the record was issued or transferred

CONTROL



- ⌘ A system qualifies if the record is created, stored and assigned in such a manner that a single authoritative copy exists which is unique, identifiable and, with limited exceptions, unalterable
- ⌘ The exceptions require that alteration be possible only with the consent of the control person and be readily identifiable as authorized or unauthorized

STATUS OF UETA



- ⌘ Adopted in 22 states, including California (Civil Code 1633), Delaware, Pennsylvania, Ohio, Virginia
- ⌘ Some states (especially California) adopted a non-uniform version
- ⌘ Introduced in 7 other states
- ⌘ Will E-SIGN slow adoption?

E-SIGN PREEMPTION



⌘ State law may modify, limit or supersede E-SIGN only if:

- ☑ Enactment of UETA as approved by NCCUSL, or

- ☑ Specifies procedures or requirements for e-records that are

 - ☑ Consistent with E-SIGN

 - ☑ Technology neutral, and

 - ☑ Going forward, must expressly refer to E-SIGN

UETA/E-SIGN DIFFERENCES



- ⌘ UETA: Evidence may not be excluded solely because it's in electronic form
- ⌘ UETA attribution rule: An electronic record is attributable to a person if it was the act of the person
- ⌘ UETA: The effect of a record or signature is determined from the surrounding circumstances

SOME USEFUL WEB SITES



⌘ Uniform Law:

☞ www.law.upenn.edu/library/ulc/ulc.htm
www.nccusl.org
www.webcom.com/legaled/ETAForum/

⌘ Federal and state legislation:

☞ www.lawrev.state.nj.us/fedbills.htm
thomas.loc.gov

⌘ General e-commerce:

☞ www.bakerinfo.com/ecommerce
www.abanet.org/buslaw/efss/whatsnew.html
www.perkinscoie.com